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Preserving Peremptories: A Practitioner's Prerogative

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PRESERVING PEREMPTORIES: A PRACTITIONER'S PREROGATIVE

Effective trial strategy mandates that attorneys select jurors who are at least fair toward, or preferably, in favor of, their client.[1] Successful advocacy further requires attorneys to identify and strike, via a challenge for cause or an unexplained peremptory challenge,[2] venirepersons who may favor the opposition.[3] Through voir dire,[4] whereby potential jurors are questioned, attorneys can obtain information useful for both choosing fair jurors and removing jurors who demonstrate an actual or potential bias against their client.[5]

[1] *See* JOAN M. BROVINS & THOMAS OEHMKE, THE TRIAL PRACTICE GUIDE: STRATEGIES, SYSTEMS AND PROCEDURES FOR THE ATTORNEY 80 (1992). "In your eyes, jurors should be biased in favor of your client and be able to return a favorable verdict." *Id.*

[2] *See* BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). "A peremptory challenge is the right to challenge a juror without assigning, or being required to assign, a reason for the challenge. In most jurisdictions each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges." *Id.* Peremptory challenges are a legislative, not constitutional right. *See* 28 U.S.C.A. § 1870 (West 1994) (granting right to peremptory challenges in civil cases); FED. R. CRIM. P. 24 (granting right to peremptory challenges in criminal cases); *see, e.g.*, N.Y. CRIM. PROC. LAW § 270.25(1) (McKinney 1993). "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned." *Id.*; *see also* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (citing Swain v. Alabama, 380 U.S. 202, 220 (1965)). "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *J.E.B.*, 114 S. Ct. at 1431; Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992). Peremptory challenges "are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *McCollum*, 112 S. Ct. at 2358; E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM. L. REV. 355, 356 (1988).

[3] *See, e.g.*, J.E.B. v. Alabama, 114 S. Ct. 1419, 1429 (1994). "Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *Id.*; *see generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, J., concurring). Voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause." *Id.*

[4] MARILYN BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY 164 (1989). Voir dire (to speak the truth) is the process by which attorneys choose triers of fact for their case. *Id.*; *see also* THOMAS J. SANNITO & PETER J. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS § 2.1 (1985 & Supp. 1992). "The term voir dire, in its narrowest meaning, refers to the advanced questioning of a potential juror or witness to determine objectivity and truthfulness before [that individual] is allowed to become an official participant in the due process of a case." *Id.*

[5] *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring); *see also* BERGER ET AL., *supra* note 4, at 164 (discussing oral voir dire process and purpose).

When selecting a jury, attorneys for both parties fundamentally use their peremptory challenges to exclude venirepersons whom they perceive to be predisposed toward their opposition's position,[6] particularly when personal biases are not sufficiently evident to support a challenge for cause.[7] Many litigators recognize that "the case can be lost before it begins"[8] if they fail to exclude jurors biased against them; therefore, attorneys consider voir dire "the most crucial part of the trial."[9] Trial strategists, illustrating the importance of carefully selecting a jury, have analogized presenting a case to the "wrong jury" to "a maestro conduct[ing] a Beethoven symphony at a meat-packing plant."[10]

The peremptory challenge, which for centuries[11] has allowed litigators to object to a certain number of prospective jurors without

[6] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84 (1986) (prohibiting peremptory strikes based on race); United States v. McMillon, 14 F.3d 948, 952-53 (4th Cir. 1994) (holding *Batson* rule not violated when prosecutor used peremptory challenge to exclude potential juror of same sex, age, and status as defendant on grounds that juror may sympathize with defendant). "One of the most regular uses of peremptory strikes is to eliminate from the final jury venirepersons whom either side believes will be too sympathetic to its opponent." *Id.* at 953. Note, however, that the Fourth Circuit decided this case five months before the Supreme Court extended *Batson* to gender in *J.E.B.* Therefore, while the court perhaps would have reached the same conclusion following *J.E.B.*, it may have given greater consideration to the defense counsel's argument that religious discrimination was the motivating force behind the strike.

[7] *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring) (citing Swain v. Alabama, 380 U.S. 202, 219 (1965) and *Batson*, 476 U.S. at 91). "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides . . . thereby assuring the selection of a qualified and unbiased jury." 114 S. Ct. at 1431 (O'Connor, J., concurring); *see also* Holland v. Illinois, 493 U.S. 474, 484 (1990) (noting that peremptory challenges are means of eliminating extremes of partiality on both sides and selecting unbiased jury).

[8] *See* BERGER ET AL., *supra* note 4, at 164.

[9] *Id.*; *see also* David Margolick, *Many Willing to Serve on Simpson Jury; Most Common Excuses Are Not Being Offered as Often as Normal*, N.Y. TIMES, Sept. 28, 1994, at A14 (quoting Judge Ito, the presiding judge in the O.J. Simpson double murder trial in Los Angeles). " 'I really think this is the greatest burden placed on the court, selecting a jury . . . .' the judge said." *Id.*

[10] SANNITO & MCGOVERN, *supra* note 4, § 2.1. The authors state:

> While there is no substitute for the verbal skill of a good attorney articulating the facts of his case, choosing the right audience to understand and appreciate his craftsmanship is of equal importance. It is during voir dire that counsel selects the evaluators of his presentation. Failure to give this part of the trial adequate attention can lead to a disastrous verdict even in a well presented case.

Id.

[11] *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting). "[T]he peremptory challenge [is] a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years." *Id.* "The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed." *Id.* at 119; *see also* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (stating that peremptory challenge's importance is proven by its persistence; it was well established at Blackstone's time and continues to endure in all states); Edmonsville v. Leesville Concrete Co., 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting) (same); Holland v. Illinois, 493 U.S.

assigning cause,[12] is under attack. The Supreme Court, in *Batson v. Kentucky*, recognized that some litigators use peremptory challenges to exclude jurors based on stereotypical racial or ethnic classifications.[13] The Court held that although peremptory challenges by their nature did not have to be explained,[14] the Equal Protection Clause[15] requires attorneys to provide racially-neutral explanations for suspect challenges, to rebut a prima facie showing of discrimination.[16]

As state courts struggle to apply the *Batson* rule,[17] the United States Supreme Court has continued to expand *Batson*'s scope.[18]

474, 481 (1990) (same); Swain v. Alabama, 380 U.S. 202, 212-20 (1965) (same); W. FORSYTHE, HISTORY OF TRIAL BY JURY 175 (1852) (noting Romans used peremptory challenges in criminal cases, and *Lex Servilia* (B.C. 104) enacted type of peremptory challenges); BERNHARD C. GANT, BLACKSTONE'S COMMENTARIES ON THE LAW 907 (1941) (illustrating that peremptory challenges were established well before Blackstone's time).

[12] *See supra* note 2 (defining peremptory challenge).

[13] *Batson*, 476 U.S. at 99. The Court stated: "The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against [black] jurors." *Id.*; *see* SANNITO & MCGOVERN, *supra* note 4, § 3.10. "One of the juror characteristics that is of greatest concern to old [craftsmen] of the courtroom is ethnic background." *Id.*; *cf.* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 116-17 (ABA Section of Litigation 1994) (discussing Clarence Darrow's article on picking juries, printed in *Esquire* magazine in 1935, which classified jurors based on religious and ethnic stereotypes). "Even some of our finest advocates have fallen for the most outrageous ideas." *Id. But see id.* "[U]sing the old courtroom stereotypes may produce unexpected results." *Id.*

[14] *See supra* note 2 (discussing definition of peremptory challenge).

[15] U.S. CONST. amend. XIV (providing that law must treat similarly situated persons similarly).

[16] Batson v. Kentucky, 476 U.S. 79, 85 (1986). "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id.*; *see also id.* at 93-94 (explaining that once party makes prima facie case of discriminatory peremptory challenge, burden shifts to other party to justify excluding juror).

[17] *Id.* The Court held that a criminal prosecutor's systematic use of peremptory challenges to eliminate potential jurors who were the same race as the defendant violated that defendant's right to equal protection under the Fourteenth Amendment. *Id.* If one party objects to the other's use of a peremptory challenge on the grounds it is discriminatory, the trial court must query into the basis for the challenge. *Id.* As in civil rights cases, the *Batson* inquiry shifts the burden of proof in the following manner:

> [F]irst, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citing *Batson* 476 U.S. at 96-98) (noting three-step inquiry required to respond to Batson claim).

[18] Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (extending *Batson* to prevent defense counsel's use of peremptories based on race); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 639 (1991) (applying *Batson* rule to civil as well as criminal cases); Powers v. Ohio, 499 U.S. 400, 410 (1991) (holding *Batson* claim can be raised even when races of defendant and potential juror differ).

Recently, in *J.E.B. v. Alabama ex rel. T.B.*,[19] the Supreme Court extended *Batson* to preclude peremptory challenges based on gender.[20] Determining that the Equal Protection Clause[21] prohibits gender-based peremptory strikes,[22] the Supreme Court for the first time extended *Batson* beyond racial classification.[23] However, only one month after deciding *J.E.B.*, the Court in *Davis v. Minnesota*[24] denied certiorari to decide whether *Batson* should be extended to prohibit peremptory challenges based solely on a prospective juror's religious beliefs, effectively allowing a challenge on those grounds in the case.[25] Therefore, it remains unclear how far *Batson* will reach, in the name of equal protection, into the controversial area of peremptory challenges.[26]

[19] 114 S. Ct. 1419, 1422 (1994) (holding intentional discrimination on basis of gender violates Equal Protection Clause).

[20] *Id.*

[21] U.S. CONST. amend. XIV.

[22] *J.E.B.*, 114 S. Ct. at 1421.

[23] *Id.* "Although premised on equal protection principles that apply equally to gender discrimination, all our recent cases defining the scope of Batson involved alleged racial discrimination in the exercise of peremptory challenges." *Id.*; *see also* Lawrence S. Robbins, *High Court Sends Mixed Messages*, N.Y. L.J., July 11, 1994, at S1 (noting *J.E.B.* marks Court's first extension of *Batson* beyond race).

[24] 114 S. Ct. 2120, 2120 (1994) (denying writ of certiorari to defendant challenging state's peremptory challenge on grounds of religious beliefs). *See* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). The Court stated: "Because religious bigotry in the use of the peremptory challenge is not as prevalent, or flagrant, or historically ingrained in the jury selection process as is race, [the court] conclude[s] that neither the federal nor [the] state constitution requires an extension of *Batson*." 504 N.W.2d at 771; *see also* Recent Decision, 107 HARV. L. REV. 1164, 1166-67 (1994).

[25] *Davis*, 504 N.W.2d 767 (Minn. 1993). During jury selection in the *Davis* trial for aggravated robbery, defendant Davis raised a *Batson* objection when the prosecutor used a peremptory strike to remove a juror who was of the same race as Davis. *Id.* at 768. In response to Davis's request for a race-neutral explanation for the strike, the prosecutor said she struck the prospective juror because he was a Jehovah's witness and explained that "in [her] experience" individuals of this religious affiliation "are reluctant to exercise authority over their fellow human beings in this Court House." *Id.* The trial court accepted this explanation and proceeded to trial; Davis was convicted. *Id.*

On appeal, Davis argued that even though the prosecutor provided a racially-neutral explanation for her objection to the juror, the court should extend *Batson* to prohibit peremptory challenges based on religion. *Id.* at 769. Rejecting Davis's argument, the Minnesota Supreme Court noted that *Batson* had been confined to racial classification and should not be broadened in this case. *Id.* at 772.

The Supreme Court decided *J.E.B.*, 114 S. Ct. at 1419 (extending Batson to prohibit peremptory challenges based on gender), on April 14, 1994, and denied certiorari in *Davis*, 114 S. Ct. at 2120, on May 23, 1994.

[26] Robbins, *supra* note 23, at S1 (noting peremptory strikes based on religion appear to violate same principle elaborated in *J.E.B.* to prohibit gender-based peremptory strikes). "It now remains to be seen whether Batson will be extended to peremptory challenges based on a potential juror's religion . . . . [I]n time the issue is likely to return to the Supreme Court." *Id.* The author suggests that perhaps the Supreme Court denied certiorari in *Davis* because the Court was reluctant to address the polemic issue of peremptory challenges so soon after *J.E.B. Id.*; *see also* Davis v. Minnesota, 114 S. Ct. 2120, 2121 (1994)

Preserving peremptory challenges in the wake of the extended *Batson* rule[27] requires courts and litigators to employ a careful and deliberate trial strategy.[28] They must maintain a careful balance of due process and equal protection rights[29] of litigants and prospective jurors[30] under the Fifth and Fourteenth Amendments.[31]

(Thomas, J., dissenting) (finding it difficult to understand how Court would not vacate and remand in light of *J.E.B.*, which shatters lower court's understanding that *Batson* applies solely to racially-based peremptory challenges). *But see Davis* 114 S. Ct. at 2120 (Ginsburg, J., concurring) (criticizing, as incomplete, dissent's portrayal of Minnesota Supreme Court's opinion). Justice Ginsburg stated that the Minnesota court "made two key observations" when it noted that religious affiliation (or lack thereof) is less self-evident than race or gender, and it is improper to ask jurors questions regarding their religious affiliation and beliefs, since this type of voir dire inquiry is "irrelevant and improper." *Id.* (quoting State v. Davis, 504 N.W.2d 767, 771-772 (Minn. 1993), noting "proper questioning" should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following law as given by court, or if they would have any difficulty in sitting in judgement)); *see also J.E.B.*, 114 S. Ct. at 1431-33 (O'Connor, J., concurring) (noting problems that extending *Batson* to gender causes); Batson v. Kentucky, 476 U.S. 79, 123-24 (1986) (Burger, J., dissenting) (noting possible fatal damage that *Batson*-type limitations could inflict on peremptory challenge). Burger argued that *Batson*'s new rule might extend to: gender; age; religious or political affiliation; mental capacity; number of children; living arrangements; and employment in a particular industry or profession; since all of these areas could constitute a "classification" subject to equal protection scrutiny. *Batson*, 476 U.S. at 123-24.

[27] *See supra* note 18 (discussing *Batson* extensions).

[28] J.E.B. v. Alabama, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (citing Swain v. Alabama, 380 U.S. 202, 218-19 (1965)). "The principal value of the peremptory is that it helps produce fair and impartial juries." 114 S. Ct. at 1431; Barbara A. Babock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 549-51 (1975) (stating that peremptories are important part of selecting fair juries); *see also* Holland v. Illinois, 493 U.S. 474, 484 (1990).

[29] U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty or property, without due process of law." *Id.*; U.S. CONST. amend. XIV. "[N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." *Id.*; *see also* U.S. CONST. art. III, § 2 (granting right to trial by jury in criminal cases); U.S. CONST. amend VI (assuring criminal defendants "the right to a speedy and public trial, by an impartial jury").

[30] Georgia v. McCollum, 112 S. Ct. 2348, 2353-54 (1992). The Court in *McCollum* noted that the discriminatory use of peremptory challenges extends beyond the litigants in a particular case. *Id.* Discriminatory challenges both infringe on the rights of potential jurors to fulfill their civic duty and threaten to undermine the public's confidence in the justice system. *Id. See* Davidson v. Gengler, 852 F. Supp. 782, 785 (W.D. Wis. 1994) (stating that harm from discriminatory use of peremptories extends beyond litigants) (citing *McCollum*, 112 S. Ct. at 2353-54). *But see J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring). Justice O'Connor noted that the Equal Protection Clause only applies to state actors. *Id.* She argued that the Clause mistakenly was held to apply to civil litigants in *Edmonson* and to criminal defendants in *McCollum*. *Id.* She also noted that subordinating the rights of the accused to the rights of the jurors was a severe misordering of priorities. *Id.* at 1432. *See generally* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 826-33 (1989) (arguing that due to state action requirement of Fourteenth Amendment, prosecutors and defense counsel should be treated differently regarding *Batson* challenges).

[31] U.S. CONST. amend XIV.

Part One of this Note examines the value of peremptory challenges in ensuring the selection of a fair jury. Part Two considers the extent to which *Batson* and its progeny neutralize the fundamental principle and ultimate effectiveness of peremptory challenges in an attempt to ensure equal protection. Part Three of this Note discusses the parameters within which peremptory challenges must be protected. This analysis supports preserving peremptory challenges without further limitations through a strategic approach to voir dire that requires litigators to look beyond demographic stereotypes and explore jurors' mental attitudes.

I. PEREMPTORY CHALLENGES: CRITICAL TO SELECTING FAIR JURIES

Although the Sixth Amendment[32] requires the state to provide for an impartial jury,[33] the courtroom reality inherent in our adversary system demonstrates that attorneys prefer jurors who are partial toward their case's theory.[34] Litigators, therefore, generally try to select venirepersons who fit their "ideal juror" profile for the case, focusing on a favorable outcome rather than impartiality.[35] These venirepersons, from the attorney's perspective, dis-

[32] U.S. CONST. amend. VI.

[33] *Id.* "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." *Id.*

[34] *See* BROVINS & OEHMKE, *supra* note 1, at 80 (providing practical discussion of jury selection process and techniques). "The objective of jury selection is to secure a jury that consists of persons who will decide the case in your client's favor. Jurors should have no predisposition against your case or in favor of your opponent's case." *Id. But see id.* "As a rule, you will want to select jurors who appear to be fair-minded and with whom you can communicate. Eliminate prospective jurors who are incompetent, biased, prejudiced against your client or cause, or who are strange or too unconventional." *Id.*

[35] *See, e.g.*, V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 214 (1985) (explaining how to conduct demographic analysis of jury panel and determine which demographic variables will most influence final verdict); BROVINS & OEHMKE, *supra* note 1, at 81. The three goals of the jury selection process are: "to select the ideal jury; to establish a rapport with all jurors; and to begin to indoctrinate [the jurors]." *Id.*; *see also* United States v. McMillon, 14 F.3d 948, 953 (4th Cir. 1994). The court stated:

> While parties in some cases have employed sophisticated experts to assist in the jury selection process, in most cases counsel on both sides attempt in some crude fashion to reduce the presence of sympathy votes by striking venirepersons having the most obvious common traits linking them to the other side.

Id.; BERGER ET AL, *supra* note 4, at 164. "While you may desire jurors biased in your favor, opposing counsel is not likely to let that happen." *Id.*

play personal characteristics that demonstrate a propensity toward that litigator's side.[36]

Generally, however, these "ideal jurors" may also be the same venirepersons whom the opposing counsel desires to eliminate through the use of a challenge for cause or a peremptory challenge.[37] It is through this process of voir dire that a fair[38] jury, able to consider equally both sides of the case, is impaneled.[39]

In an effort to determine a potential juror's attitude towards a particular case, attorneys often rely on stereotypes based on demographic characteristics.[40] This reliance stems from the hypothesis that there is a consistent relationship between demographic variables and attitudes toward the issues of a case.[41] While demographic characteristics may provide litigators with some guidance in choosing desirable jurors, they are not dispositive and often re-

[36] *See, e.g.*, BERGER ET AL., *supra* note 4, at 167. For example, attorneys seek jurors "who will look favorably on [them], [their] client, [their] witness, and [their] case theory and render a verdict accordingly." *Id.*

[37] *Id.* at 164 (providing litigators with practical guide for selecting juries). The author notes:

> [Y]our opposition will try to remove all jurors favorable to you, as you will try to remove those favorable to your opponent. Therefore, you must direct your attention to making certain that the jurors will view the presentation of your case theory on its merits, without the extraneous distortion that will result from any personal biases against you, your client, your witnesses, or your theory itself.

Id.

[38] *See* BLACK'S LAW DICTIONARY 595 (6th ed. 1990). "Fair" is defined as: "just; equitable; even-handed; equal, as between conflicting interests." *Id.* Although "fair" and "impartial" often are used interchangeably, notable semantic distinctions arguably exist. A fair jury infers that jurors will give equal consideration to both sides of the case, regardless of individual biases or predispositions toward one side. *Id.* "Impartiality," on the other hand, implies a higher standard, indicating that predispositions do not exist. *Id.* at 752 (defining "impartial" as: "favoring neither; disinterested; treating all alike; unbiased"); *see also id.* at 596 (defining "fair and impartial jury" as jury chosen to hear evidence and render verdict without any fixed opinion concerning guilt, innocence or liability of defendant); *Id.* at 752 (defining "impartial jury" as having impartial frame of mind at beginning of trial, influenced only by legal and competent evidence produced during trial, and basing its verdict upon evidence connecting defendant with commission of crime charged).

[39] BERGER ET AL., *supra* note 4, at 164. "You are entitled to a fair shot, not a rigged game. And if you have thoroughly prepared your case, a fair shot is all you need." *Id.*; *see also* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1429 (1994). "Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *Id.*

[40] *See, e.g.*, STARR & MCCORMICK, *supra* note 35, at 211 (discussing demographic analysis of jury panel). The authors define demographic analysis of venirepersons as "a system of pretrial analysis for evaluating whether a potential juror's attitudes are likely to favor or disfavor the view of the issues that will be presented in court by the trial team." *Id.*

[41] *Id.* at 212; *see also J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring). "We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors." *Id. But see* REID HASTIE ET AL., INSIDE THE JURY 140 (1983). "The majority of studies suggest that gender plays no identifiable role in jurors' attitudes." *Id.*

sult in erroneous generalizations and discrimination.[42] Therefore, when balancing the due process rights of litigants with the equal protection interests of litigants and prospective jurors,[43] *Batson* restrictions on peremptory challenges appear to be justified when reasonably applied to certain types of discrimination, such as race and gender.[44]

II. AFTER BATSON: ARE PEREMPTORY CHALLENGES STILL PEREMPTORY?

Since *Batson* requires litigators in certain instances to justify their peremptory challenges,[45] some commentators logically argue that peremptory challenges are no longer "peremptory."[46] In the New York case of *People v. Bolling*, for example, Judge Joseph Bellacosa criticized *Batson*'s paradoxical requirement that litigators justify peremptory challenges, which are meant to be made without explanation.[47] Nevertheless, peremptories still play an important role in jury selection.[48]

[42] *See, e.g.*, SANNITO & MCGOVERN, *supra* note 4, § 3 (discussing jury characteristics and predicting verdicts). "Trial attorneys are too frequently put in the position of choosing jurors using folklore, superstitions and desperate hunches." *Id.* § 3.1; *see also* BLACK'S LAW DICTIONARY 467 (6th ed. 1990) (citing Baker v. California Land Title Co., 349 F. Supp. 235, 238-39 (C.D. Cal. 1972)). "Discrimination" is defined as: "[u]nfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion;" and "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." *Id.*

[43] U.S. CONST. amend XIV. "No state shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

[44] *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1427 (1994). "Discrimination in jury selection, whether based on race or gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* The Court's reasoning also logically may be applied to religious discrimination in the use of peremptory challenges. *See infra* notes 58-65 and accompanying text. *But see J.E.B.*, 114 S. Ct. at 1432-33 (O'Connor, J., concurring). "Limiting the accused's use of the peremptory is 'a serious misordering of our priorities,' for it means 'we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.'" *Id.* (citing *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring)).

[45] Batson v. Kentucky, 476 U.S. 79, 90 (1986) (requiring race-neutral justifications for apparently discriminatory peremptory challenges); FED. R. CRIM. P. 24; 28 U.S.C. § 1870 (1988). Peremptory challenges, however, are objections to venirepersons that do not require an explanation. *Id.*; *see also*, N.Y. CRIM. PROC. LAW § 270.25(1) (McKinney 1993) (legislating peremptory challenge; right to object to prospective juror without assigning reason).

[46] *See* People v. Bolling, 79 N.Y.2d 317, 326, 591 N.E.2d 1136, 1142, 582 N.Y.S.2d 950, 956 (1992) (Bellacosa, J., concurring) (discussing *Batson*'s effect on peremptory challenges).

[47] *Id.* "Analytically, peremptories and race-neutral articulations present a quintessential and untenable dualism. A peremptory challenge by its nature should not have to be explained . . . *Batson*, of course, necessarily changed that." *Id.*

[48] *See id.* "Peremptories have outlived their usefulness and, ironically, appear to be disguising discrimination—not minimizing it, and clearly not eliminating it." *Id. But see J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring). "Because I believe the peremptory

Despite *Batson*'s limitations, peremptory challenges require a lower standard of justification than challenges for cause,[49] and often allow litigators to strike prospective jurors when the motivation for the strike might be insufficient to remove the juror using a challenge for cause.[50] Peremptory challenges also enable litigators to object to venirepersons for race- or gender-neutral reasons that they may be unable to articulate.[51] Therefore, although *Batson* and its progeny eliminate litigators' unbridled use of peremptory challenges,[52] this right to object to jurors, at least generally without assigning cause, is a valuable tool for selecting fair juries and should be preserved.[53]

remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause." *Id.*

[49] *See J.E.B.*, 114 S. Ct. at 1430 (noting that peremptory challenges need not raise to level of "for cause" challenge, cannot be based on race or gender, and cannot be pretextual); Hernandez v. New York, 500 U.S. 352, 362-63 (1991) (noting lower standard required to justify peremptory challenge than to sustain challenge for cause).

[50] J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994). "When an explanation is required, it need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender [or race], and the proffered explanation may not be pretextual." *Id.* Whether an explanation is sufficient to defeat a *Batson* claim is a matter of the court's discretion. *Id.*; *see also Hernandez*, 500 U.S. at 370 (holding court determines whether litigator's explanation is sufficient to rebut *Batson* claim of discrimination). *But see Bolling*, 79 N.Y.2d at 326 (Bellacosa, J., concurring) (discussing courts' difficulty in determining whether litigators' explanations for peremptory challenges are sufficient or merely pretextual). "The process that requires courts to sift through counsel's words for patterns or pretexts of discrimination has not served the goal of cutting the discriminatory weeds out of the jury selection process." *Id.*

[51] *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *Id.*; *see also* Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting). Chief Justice Burger argued that "in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of 'assumption' or 'intuitive judgement.' " *Id.*

[52] *Batson*, 476 U.S. at 97 (noting once defendant made prima facie showing of race-based challenges, burden shifted to state to offer neutral explanation for challenging black jurors); *see also J.E.B.*, 114 S. Ct. at 1429-1438 (extending *Batson*'s requirement of prima facie showing of discrimination to gender-based challenges); *Hernandez*, 500 U.S. at 359 (applying three-step *Batson* race-based discrimination standard to challenges used to eliminate potential Spanish-speaking jurors).

[53] *J.E.B.*, 114 S. Ct. at 1429 (limiting restriction on peremptory challenges and specifically noting that holding is not intended to eliminate all peremptory challenges). "Parties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias." *Id.* The Court also pointed out that parties may use peremptory challenges "to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id.*; *see also Batson*, 476 U.S. at 105 (Marshall, J., concurring) (noting *Batson* still allows unconstitutional use of peremptory challenges, provided discrimination is held to "acceptable" or nonascertainable level); *Id.* at 107 (noting that "inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds ideally should lead the Court to ban them entirely from the criminal justice system"); People v. Bolling, 79 N.Y.2d 317, 327

Although the Supreme Court has applied *Batson* beyond racial classifications,[54] it remains unclear how far *Batson* will extend in the name of equal protection to require litigators to justify their peremptory challenges.[55] The question of *Batson*'s reach is underscored by the recognition that *Batson* now applies beyond race, an "inherently suspect" classification demanding the Court's highest or "strict scrutiny" standard of review for discrimination,[56] to gender, a less suspect classification that requires only intermediate or "heightened scrutiny" standard of review.[57]

Applying the Court's rationale in *J.E.B.*, it appears that the Supreme Court also would extend *Batson* to prohibit peremptory challenges based on religion, because this classification, like race, requires the Court's "strict scrutiny" standard of review for discrimination.[58] The Court in *Davis v. Minnesota*,[59] however, re-

(1992) (Bellacosa, J., concurring). "Perversely, many varieties of discrimination, except the most overt, flagrant manifestations, appear to be surviving the scrutiny of the half-step *Batson* remedy." *Id. But see id.* at 89 n.12 (eschewing question of whether Constitution limits exercise of peremptory challenges by defense counsel).

[54] *J.E.B.*, 114 S. Ct. at 1421 (extending *Batson* protection to prohibit gender-based classifications).

[55] *See, e.g.*, Lawrence S. Robbins, *High Court Sends Mixed Messages*, N.Y. L.J., July 11, 1994, at S1 (regarding Court's decision to apply *Batson* beyond racial classifications). "It now remains to be seen whether Batson will be extended . . . ." *Id.*

[56] *See, e.g.*, D. KIRP ET AL., GENDER JUSTICE 137 (1986) (noting racial equality has proved more challenging to achieve than gender equality); *see also* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1435 (1994) (Rehnquist, J., dissenting) (noting classifications based on race are inherently suspect, while gender-based classifications are subject to lower standard of review).

[57] *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-724 (1982) (requiring "heightened scrutiny" when considering discrimination based on gender). The Court noted that:

> [T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification . . . the burden is met only by showing at least that the classification serves "important governmental objectives" and that the discriminatory means employed "are substantially related to the achievement of those objectives."

Id. at 724; *see also J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting) (citing Larson v. Valente, 456 U.S. 228, 244-46 (1982) (requiring "heightened scrutiny" regarding discrimination based on religion)). *Compare* Korematsu v. United States, 323 U.S. 214, 216 (1944) (requiring "most rigid scrutiny," subsequently labeled "strictest scrutiny," when considering discrimination based on race) *with* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-42 (1985) (requiring "rational basis" review of cases involving discrimination based on mental capacity) *and* Clark v. Jeter, 486 U.S. 456, 461 (1988) (requiring "rational basis" review of discrimination based on illegitimacy).

[58] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (noting that potential religious discrimination is subject to "strict scrutiny" review); *cf.* United States v. Greer, 939 F.2d 1076, 1086 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 1390 (1993). "Whether Jewish jurors are viewed as members of a 'race' . . . or a religion, a defendant's exercise of peremptory challenges against them is subject to *Batson*'s strictures." *Id.* at 1086 n.9.

[59] *See supra* notes 24-25 (discussing *Davis*).

cently denied certiorari on this issue.[60] Dissenting from the Court's denial of certiorari in *Davis*, Justice Clarence Thomas, joined by Justice Antonin Scalia, argued that there seemed to be no reason for declining to apply the *Batson* rule to a classification requiring even "heightened scrutiny" under the Equal Protection Clause, since the *J.E.B.* Court already extended *Batson* to gender.[61] However, Justice Ruth Bader Ginsburg, concurring in the denial of certiorari, indicated that the state court properly distinguished religion from more "self-evident" classifications such as race and gender.[62] Justice Ginsburg further noted that the voir dire inquiry into a juror's religious affiliation and beliefs ordinarily is irrelevant, prejudicial, and improper.[63] Additionally, Justice Ginsburg suggested that courts generally should prohibit the questioning of prospective jurors with respect to their religious affiliation, or lack thereof.[64] Even with such a ban on questioning, however, courts probably will still need to determine whether *Batson* extends to religion, because litigators can use juror demographics, such as surname and appearance, as a basis for making stereotypical assumptions regarding a juror's religious affiliation.[65]

The *J.E.B.* majority found that the purpose of *Batson* mandated extending the rule against racial discrimination to prohibit gender-based peremptory challenges.[66] To support its holding, the

[60] *Davis*, 114 S. Ct. at 2121 (Thomas, J., dissenting). Justice Thomas noted:

> In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive . . . "heightened" or "intermediate" scrutiny, *J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications—a category which presumably would include classifications based on religion.

Id.

[61] *Id.* at 2121 (Thomas, J., dissenting) (noting lower court based its decision on grounds *Batson* was limited to race).

[62] *Id.* at 2120 (Ginsburg, J., concurring).

[63] *Id.*

[64] *Id.*

[65] *See, e.g.*, State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). "This is not to say that religious intolerance does not exist in our society, but only to say that there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system." *Id. But cf.* United States v. Greer, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991) (applying *Batson* to prohibit defendant from using peremptory challenges to exclude Jewish venirepersons, even if this discrimination was based on religious, not racial classification).

[66] J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (supporting decision to apply *Batson*, traditionally limited to race-based discrimination, to preclude classifying jurors based on gender). "Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself." *Id.*

Court expressed concern that if it did not apply *Batson* to preclude gender-based strikes, litigators might use gender as a pretext for eliminating jurors based on race.[67] Race, however, was not an issue in *J.E.B.*[68] As a result, the Court's ruling is not limited to cases where racial and gender discrimination might overlap.[69] Peremptories could perish in light of this reasoning, therefore, because race and gender coexist with all of the other demographic classifications that most, if not all, litigators at least consider during voir dire.[70]

It seems overbroad, however, to interpret *J.E.B.* as grounds for eliminating peremptory challenges when considering that the Court expressly limited its holding to gender and specifically supported peremptory challenges.[71] Accordingly, the fact that race and gender overlap other characteristics evidences that the Court is inclined to limit *Batson* to the "self-evident" classifications of

[67] *Id.* "Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination . . . [serving to] insulate effectively racial discrimination from judicial scrutiny." *Id.* The Court supported this rationale by recognizing that the majority of lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women. *Id.* at 1430 n.18. The Court further noted that all four gender-based peremptory cases to reach the federal courts of appeals also involved the striking of minority women. *Id.* at 1430; *see also* United States v. De Gross, 960 F.2d 1433, 1437-43 (9th Cir. 1992) (en banc) (extending *Batson* to prohibit gender-based peremptory challenges in both criminal and civil trials); *cf.* United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993) (declining to extend *Batson* to gender); United States v. Nichols, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (same), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) (same), *cert. denied*, 493 U.S. 1069 (1990).

[68] *J.E.B.*, 114 S. Ct. at 1421 (noting that excluded jurors' race was not in issue). The petitioner objected to the State's use of peremptory challenges against male jurors, claiming gender was sole basis of strikes, violating Equal Protection Clause. *Id.* at 1421-22. In *J.E.B.*, after the trial court excused three jurors for cause, attorneys selected the jury from a pool of 10 male and 33 female venirepersons. *Id.* The State used nine of its 10 peremptory strikes to remove male jurors and the defendant used all but one of his strikes to remove female jurors. *Id.* at 1422. As a result, all the selected jurors were female. *Id.*

[69] *Id.* at 1429. The Court recognized that certain characteristics may be disproportionately associated with one gender but, as long as that characteristic and not gender is the basis for the strike, the peremptory challenge cannot be said to be unconstitutional. *Id.*

[70] *Id.* "Before a demographic analysis is of any value in the jury selection process, the trial attorney should know at least the age, sex, and occupation of every person on the jury list. Marital status, spouse's occupation, and number of children should also be known." STARR & MCCORMICK, *supra* note 35, § 7.1; *see also* SANNITO & MCGOVERN, *supra* note 4, § 3 (examining impact of demographic variables on jurors' attitudes toward cases, noting that "[c]haracteristics that mildly predisposed jurors were sex, race, and number of brothers and sisters").

[71] *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1429 (1994) (O'Connor, J., concurring) (noting that holding does not imply elimination of all peremptory challenges). *Id.* at 1431 (stating peremptory challenge remains important litigator's tool and fundamental part of selecting impartial juries).

race and gender, rather than to extend it so far as to abrogate peremptory challenges.[72]

Despite the *J.E.B.* Court's limiting language, however, a logical interpretation of the majority's reasoning indicates that *Batson* would restrict peremptory strikes based on numerous classifications.[73] This is because the Equal Protection Clause, on which the Court based its decision, applies to discrimination far beyond race and gender.[74] Consequently, the principles of the Court's equal protection extension of *Batson* seem to justify its extension beyond manifest demographics, such as race and gender, to at least religion.[75] Simultaneously, however, the Court seems reluctant to intrude further into the litigator's historic and necessary right to exercise peremptory challenges.[76] Accordingly, the Court should not extend *Batson* so far as to subject peremptory challenges to scrutiny or review based on less invidious uses than *Batson* and its progeny already delineate.[77]

[72] Davis v. Minnesota, 114 S. Ct. 2120, 2120 (1994) (Ginsburg, J., concurring). "Religious affiliation is not as self-evident as race or gender." *Id.*

[73] *Id.* at 2121 (Thomas, J., dissenting) (stating that *Batson* limitations on peremptory strikes would include classifications based on religion).

[74] *Id.* Justice Thomas argued:

> Once the scope of the logic in *J.E.B.* is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions on the exercise of the peremptory strike outside the context of race and sex.

Id.

[75] *Id. But cf. J.E.B.*, 114 S. Ct. at 1428 n.14 (rejecting argument that all peremptory challenges are based on stereotypes of some kind).

> [W]here peremptory challenges are made on race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.

Id. (citing Barbara Babcock, *A Place in the Palladium, Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1173 (1993)).

[76] *J.E.B.*, 114 S. Ct. at 1428 (noting *Batson* extension does not imply the elimination of all peremptory challenges). Justice O'Connor explained that the *J.E.B.* holding should be limited to gender so as to prevent further eroding the peremptory challenge. *Id.* at 1431 (O'Connor, J., concurring). The *J.E.B.* majority noted:

> We do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.

Id. at 1425-26. It appears that the Court has limited the *J.E.B.* holding, at least for the present, in view of its denial to grant certiorari in *Davis v. Minnesota*. *See supra* note 65.

[77] Davis v. Minnesota, 114 S. Ct. 2120, 2120 (1994) (Ginsburg, J., concurring) (quoting State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993)). "[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender." 114 S. Ct. at 2120; *cf.* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring). "[T]o say that [gender] makes no difference as a matter of law is not to say that [gender] makes no difference as a matter of fact." *Id.* Rather than asking jurors direct questions regarding their religious affiliation

III. PARAMETERS FOR PRESERVING PEREMPTORY CHALLENGES

Despite the potency of the Equal Protection Clause and *Batson*'s fortitude, the Supreme Court seems inclined to preserve peremptory challenges.[78] The Court repeatedly has recognized the importance of peremptory challenges to ensure a litigant's due process right.[79] Preserving peremptories in the wake of the extended *Batson* rule, however, requires courts and litigators to balance carefully the Fourteenth Amendment Due Process and Equal Protection rights[80] of litigants and jurors, without eroding effective trial strategy.

Peremptory challenges have coexisted with the Equal Protection Clause for 120 years.[81] The *Batson* Court, precluding attorneys from basing peremptory challenges on race, recognized that although the Equal Protection Clause limited the litigator's historic right to peremptory strikes, "the peremptory challenge occupies an important position" in trial procedures.[82] The Court further noted that the rule was not intended to "undermine the contribution the challenge generally makes to the administration of justice."[83] Concurring in *J.E.B.*, Justice Sandra Day O'Connor agreed that *Batson* applies to peremptory challenges based on

(or lack thereof), litigators should ask open-ended question geared toward revealing juror attitudes toward the primary issue of the case. *See generally* SANNITO & MCGOVERN, *supra* note 4, § 3. *But see* STARR & MCCORMICK, *supra* note 35, at 23 (noting that while voir dire enables attorneys to interview potential jurors, it may not reveal fully their biases).

[78] *See supra* note 71 (supporting preservation of peremptory challenges).

[79] *Id.*

[80] U.S. CONST. amend XIV.

[81] J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1436-37 (1994) (Scalia, J., dissenting) (attributing coexistence of peremptory challenges and Equal Protection Clause to fact that all groups are subject to peremptory challenges); *see also* Mark A. Kornfeld, Comment, United States v. Gelb: *The Second Circuit's Disappointing Treatment of the Fair Cross-Section Guarantee,* 57 BROOK. L. REV. 341, 344 (1991) (since jury is composed of human beings with human prejudices, impartiality never really can be guaranteed). *But cf.* Davis v. Minnesota, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting) (noting that subjecting peremptory strikes to Court's harsh equal protection analysis may eradicate them altogether).

[82] Batson v. Kentucky, 476 U.S. 79, 98-99 (1986); *see also J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting) (noting that *Batson* Court was careful not to undermine peremptory challenge's significant contribution to administration of justice); *see supra* note 74 and accompanying text (discussing potential impact of applying Equal Protection Clause to peremptory strikes). *See generally* Joshua E. Swift, Batson*'s Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 339 n.24 (1993) (noting that eliminating racial discrimination from courtroom has remained fundamental constitutional mandate).

[83] *Batson*, 476 U.S at 98-99.

gender as well as race,[84] but expressed reluctance to restrict further this important tool for ensuring an impartial jury.[85] Soon thereafter, Justice Thomas, dissenting in *Davis*, warned that the Court's *J.E.B.* ruling threatens to abrogate peremptory challenges.[86] Justice Thomas recognized that peremptories could not endure the stringent test of the Equal Protection Clause, which proscribes classifications beyond race and gender.[87]

Recognizing the apparent discord between adhering to constitutional directives for ensuring equal protection[88] and employing practical techniques for attaining fair (or even strategic) jury verdicts,[89] the Minnesota Supreme Court in *Davis* refused to extend *Batson* to preclude peremptories solely based on a prospective ju-

[84] *J.E.B.*, 114 S. Ct. at 1430-31 (O'Connor, J., concurring) (noting that only government, not defendants or private litigants, should be prohibited from using gender-based peremptory strikes). "[T]he Equal Protection Clause prohibits the government from excluding a person from jury service on account of that person's gender . . . [b]ut today's important blow against gender discrimination is not costless." *Id.*

[85] *Id.* at 1431. Justice O'Connor stated: "Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause." *Id.*; *cf.* Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring) (stating that *Batson* does not apply "[o]utside the uniquely sensitive area of race").

[86] Davis v. Minnesota, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting). "It has long been recognized by some members of the Court that subjecting the peremptory strike to the rigors of Equal Protection analysis may ultimately spell the doom of the strike altogether." *Id.* As noted by Chief Justice Burger, peremptory challenges are "an arbitrary and capricious right" to which the Equal Protection Clause, which requires "rationality" in government actions, does not apply. *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting).

[87] J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (recognizing Court's decision further erodes peremptory challenge's role). "Once the scope of the logic in *J.E.B.* is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions on the exercise of the peremptory strike outside the context of race and sex." *Id.* "In further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event." *Id.*

[88] *Id.* at 1430. "[T]he Equal Protection Clause prohibits discrimination in jury selection on . . . the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." *Id.*

[89] *J.E.B.*, 114 S. Ct. at 1430. "[T]o say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact." *Id.* at 1432 (O'Connor, J., concurring). "The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely "stereotyping" to say that these differences may produce a difference in outlook which is brought to the jury room." *Id.* at 1435 (Rehnquist, C.J., dissenting); *see also* SANNITO & MCGOVERN, *supra* note 4, § 3 (discussing results of study measuring juror characteristics and verdicts). "People of Irish descent, especially women, are significantly more prone to convict than any other ethnic group studied . . . [w]omen convict slightly more than men . . . and women with degrees were significantly more prone to convict more than to acquit." *But see id.* § 3.10 (noting that courtroom reliance on ethnic traits is simplistic and often risky).

ror's religion.[90] Distinguishing between "logic[al]" and practical limits on post-*Batson* peremptory challenges, the Minnesota court noted that if logic were to rule over experience, *Batson* would prohibit many biases, including religious prejudices.[91]

The augmented *Batson* rule mandates that litigants venture beyond perfunctory juror classifications to employ a method for selecting jurors that is both constitutional and strategic.[92] While demographic variables may provide crude guidelines during the initial stage of voir dire,[93] they often are inadequate indicators of an individual's propensity toward a particular viewpoint and, therefore, an insufficient means for evaluation.[94] It is far more effective to uncover and evaluate jurors' psychographic[95] variables,

[90] State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994); *see also* State v. Weatherspoon, 514 N.W.2d 266, 277 (Minn. 1994) (Randall, J., concurring) (explaining that *Davis* distinguished religious from gender discrimination by presuming that *Batson* protection need not extend to religion because peremptory challenges had not yet attacked religion in Minnesota); State v. Eason, 445 S.E.2d 917, 923 (N.C. 1994) (concluding that allowing prosecutor to dismiss juror due to her beliefs regarding death penalty was not religious discrimination).

[91] *Davis*, 504 N.W.2d at 769. "If the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias and, for that matter, an endless number of other biases." *Id.*

[92] *See* Batson v. Kentucky, 476 U.S. 79, 85-86 (1986) (citing Martin v. Texas, 200 U.S. 316, 321 (1906)). "[T]he defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85-86; *see, e.g.*, BERGER ET AL., *supra* note 4, at 167-68 (explaining how to create and use demographic profiles of ideal and unfit jurors; stereotyping may be crude and inaccurate when applied to individual but can provide helpful framework for voir dire); BROVINS & OEHMKE, *supra* note 1, at 80 (noting demographic analysis of juror's background, characteristics, abilities, and experience, although important, should not be sole criteria for service as juror). *See generally* SANNITO & MCGOVERN, *supra* note 4, at 23 (noting that if potential juror appears unfavorable, that juror's strength of belief or leadership is important in peremptory challenge decision because it may impact deliberations).

[93] BERGER ET AL., *supra* note 4, at 168 (noting that jury selection process, although dependent on socioeconomic stereotyping, is crude and can be inaccurate when applied to individuals).

[94] *Id.* at 168-69 (explaining that once attorneys create initial framework for selecting jurors, they must refine their ideas). For example, if a defendant in a robbery case was a factory worker with a low income, the defense counsel, initially, may want a juror with a similar profile. *Id.* However, such a juror may not be favorable if he or she is a hard worker who despises people who steal. *Id.*; *see also* JAMES W. JEANS, SR., TRIAL ADVOCACY § 9.8 (2d ed. 1993) (suggesting two-step process for selecting jurors: first, identify relationships with counsel, client, confederates, and cause; second, use that identification to recognize any similarities that may exist).

[95] ARNOLD MITCHELL, THE NINE AMERICAN LIFESTYLES at vii (1983). Psychographics "describes the entire constellation of a person's attitudes, beliefs, opinions, hopes, fears, prejudices, needs, desires, and aspirations that, taken together, govern how one behaves." *Id.*; *see also* HAL HIMMELSTEIN, TELEVISION MYTH AND THE AMERICAN MIND 64 (1984). "Psychographics moves beyond such often unreliable demographic information as income, age, sex and place of residence, all of which are incomplete descriptive data rather than interpretive information." *Id.* "The ultimate goal of this research approach is to develop a group's so-called psychographic portrait, consisting of generally applicable personal values, attitudes and emotions." *Id.* Both consumer advertisers and political candidates use psy-

such as personal values and attitudes, rather than to rely on demographic classifications, such as age and race, as possible indicators of a juror's predisposition toward a particular viewpoint.[96]

Voir dire provides only a limited time for direct questioning, during which most people fail to admit openly to unfairness or bias.[97] Skilled litigators, therefore, often must rely on nonverbal, intuitive skills to gain insight into venirepersons' hidden attitudes, values, and feelings.[98] At times during jury selection, attorneys must rely on intuition and unidentifiable indicators, such as a lack of rapport with a juror.[99] Peremptory strikes are a particularly important device for eliminating potentially biased jurors in these instances, because litigators' information about a juror is restricted and their explanations for removing those jurors might not be sufficient to sustain a challenge for cause.[100] Recognizing this, Justice O'Connor stated that increasing restraints on the use

chographic research to identify and appeal to target audiences. *See generally* Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 706 (1993) (discussing that psychographics, which are more refined principles than demographics, enable advertisers to divide consumers into market segments characterized by particular psychological makeups). "Voter attitudes are studied and the electorate segmented by the same research strategies [demographics and psychographics] employed for selling pretzels and beer." *Id.* at 725-26.

[96] *See, e.g.*, SANNITO & MCGOVERN, *supra* note 4, § 2.2. The authors assert that experienced litigators use a number of subtle and sophisticated methods during voir dire to "tease out" hidden attitudes and predispositions which might affect jurors' judgment during deliberation. *Id.* The authors also note that most of the information that a psychologist uses to unravel the mysteries of a personality comes from nonverbal, intuitive skills. *Id.* Jury selection is most effective when subtle techniques are employed to discover unconscious attitudes, feelings, and beliefs a juror suppresses. *Id.* § 2.42. An attorney should part from the traditional, detached methods of jury selection and instead use new methods like "analyzing suggestibility . . . and observing nonverbal cues." *Id. But see, e.g.*, STARR & MCCORMICK, *supra* note 35, § 7.1. The authors note that a value can be placed on each demographic characteristic allowing the attorney to assign each juror a specific value. *Id.*

[97] SANNITO & MCGOVERN, *supra* note 4, § 2 (discussing voir dire).

[98] *Id.*; *see also* BROVINS & OEHMKE, *supra* note 1, § 7.20 (discussing how to read body language and demeanor of jurors during voir dire). The authors advocate an interpretation of the whole person: examine clothing, walking style, facial expressions, body position, and tone of voice. *Id.* The nuances of human behavior must be studied to determine how a jury actually might react during deliberations. *Id.*; JEANS, *supra* note 94, § 9.11 (determining that most significant part of jury selection is discovering how prospective jurors will identify with case's primary issue). Classifying jurors into categories such as ethnicity, occupation, and religion is "stultifying" and results in improper generalizations. *Id.* To attain jurors who best identify with the case's issue, the litigator must look beyond demographics and examine jurors' relationships, experiences, and activities. *Id.*

[99] *Id.*

[100] *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (noting that if peremptory challenges are deterred, lawyers may not use them out of concern that they could not justify them and court automatically would seat unfavorable juror).

of the peremptory challenge forces attorneys to articulate reasons for strikes that they sometimes cannot articulate.[101]

Beyond relying on nonverbal cues and intuition, however, litigators must also question venirepersons strategically along a correlated, rather than direct, line of questioning.[102] Indirect questioning is based on the principle that people generally will not confess publicly to private biases and prejudices, particularly during voir dire, where the focus is on selecting fair and impartial jurors.[103] For example, the question, "Could you be fair to a homosexual defendant?" would not elicit a potential bias as effectively as would a less direct line of questioning, such as one regarding a juror's community involvement, associates, and experiences.[104] Juror's verbal and nonverbal responses to such questions, as well as to the litigator, provide far more insight than race, gender, or religious affiliation to determine the juror's capability to evaluate fairly the attorney's case.[105] Furthermore, such responses provide the attorney with information for avoiding and, if necessary, defending, a *Batson* claim of discriminatory peremptory challenges.[106]

In addition to strategic questioning during voir dire, written juror questionnaires also can reveal detailed information about the attitudes and experiences that might influence a juror's perspective on certain issues.[107] Questionnaires, administered before oral

[101] *See id.* "[A]s we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable." *Id.*

[102] SANNITO & MCGOVERN, *supra* note 4, § 2.10. Direct questioning will lead to imperfect answers because potential jurors will deny their prejudices and biases in an effort to project a favorable image. *Id.* However, correlated questioning produces more accurate results because it isolates the most important psychological attitude in jurors and then examines jurors through a method that appears unrelated but actually is intimately connected to the major concern of the litigation. *Id.*

[103] *Id.*

[104] *Id.*; *see also* BERGER ET AL., *supra* note 4, at 174 (developing appropriate juror profile requires litigator first to use juror-specific profile, then to develop questions that will infer whether or not juror meets profile). *But see* BROVINS & OEHMKE, *supra* note 1, § 7.27 (noting jurors do not like to be questioned on matters they perceive to be none of counsels' business and have no immediate bearing on jurors' qualifications).

[105] *See* BROVINS & OEHMKE, *supra* note 1, § 7.20 (advocating interpreting "whole" person during jury selection, including body position and tone of voice).

[106] *See generally* BERGER ET AL., *supra* note 4, *passim* (discussing jury selection process).

[107] Matthew L. Larrabee & Linda P. Drucker, *Adieu Voir Dire: The Jury Questionnaire*, 21 LITIGATION 1, 37 (1994). "Unlike the older type of juror questionnaires which courts prepared and asked only for basic demographic information such as age, sex, and employment history, th[e] new generation of juror questionnaires goes much further." *Id.* The typical questionnaire contains a combination of general background questions and case-specific questions about the juror's attitudes and experiences toward the parties or issues involved in the particular case. *Id.* at 39. Generally, questionnaires often ask about attitudes toward

voir dire, can enable litigators to target their questions during oral voir dire in order to elicit more effective psychographic information in less time.[108] Additionally, questionnaires are more likely to elicit honest responses because they provide a less threatening situation than requiring jurors to reveal personal information and beliefs in open court.[109]

Recognizing that time and pragmatic constraints do not allow attorneys to ascertain a juror's full psychological profile before the attorney must select a jury,[110] litigants often are forced to make immediate judgments based on probabilities.[111] Predictions based on psychographic indicators, such as materials jurors read or organizations in which they are involved, however, are more accurate and far less objectionable than judgments based on mere demographic variables.[112]

Therefore, an approach to voir dire that is both effective and constitutional focuses on psychographic, rather than demographic, characteristics of prospective jurors.[113] While noting that

the amount of litigation in society and the size of damage awards; whether a juror has had management or supervisory responsibilities (to assess leadership potential); and which magazines and newspapers the juror reads regularly. *Id.* at 40.

[108] *Id.* at 38 (discussing benefits of questionnaires). "With basic information on all members of the panel already available in written form, you can obtain better information out of oral voir dire in less time. Using the jurors' questionnaire responses, you can formulate different, narrowly-targeted follow-up questions for each juror." *Id.* "[M]any judges not only accept but actually encourage such questionnaires because of their enormous time-saving features." *Id.*

[109] *Id.* "Many attorneys and jury consultants are convinced that they get more candid and honest information from the questionnaires than from oral voir dire in open court. While potential jurors start to sound alike in open court, jurors' responses to written questionnaires reflect a much broader spectrum of opinions." *Id.*; *see also* Aaron I. Reichel, *Further Jury Reform Proposals*, N.Y. L.J., July 1, 1994, at 1 (supporting requirement of background questionnaires in jury selection). "[W]e should not be meting out justice by examining skin colors on video screens, but we should be willing and able to screen out the [biased jurors] in our midst while still protecting their privacy." *Id.*

[110] *See* ARNE WERCHICK, MODERN CIVIL JURY SELECTION § 19-2 (1988) (discussing time constraints of civil voir dire). "In the average trial, jury selection is budgeted a relatively (might we even say, miserably) short time, and the interval between questioning and challenging is measured in minutes, not hours." *Id.*

[111] Larrabee & Drucker, *supra* note 107, at 40 (discussing practical benefits of juror questionnaires). The authors noted:

> [T]he reality is that the jury selection process simply doesn't permit lawyers the time to understand or appreciate the full subtlety or complexity of each individual jurors' psyche. Therefore, in the real world, lawyers are forced to make snap judgments based on probabilities. The point of the juror questionnaire is to ask enough questions—particularly open-ended questions that allow the juror to express himself in his own words—to get a better sense of the juror's opinions and personality.

Id.

[112] *See id.* (discussing indicators that help reveal juror's opinions and personality).

[113] *See* SANNITO & MCGOVERN, *supra* note 4, § 2.2. The authors entertained serious doubts as to whether the Sixth Amendment could be upheld solely through a litigator's

certain demographic variables, such as age and occupation,[114] can indicate a venireperson's propensity toward a particular viewpoint,[115] litigators must query beyond stereotypical and often erroneous indicators. After all, it is mental attitudes, not demographics, that truly determine whether a juror is sufficiently impartial to evaluate the case.[116]

CONCLUSION

Selecting a jury in the wake of *Batson* jury compels litigators to probe beyond mere demographic distinctions, such as race and gender, to determine the psychographic variables that make the individual a preferable or potentially adverse juror in a particular case. While demographic characteristics may provide initial guidelines for voir dire, litigators cannot assume that these demographics evidence mental attitudes toward the trial, case topic, litigant, and litigator. Therefore, during voir dire a litigator must analyze venirepersons' verbal and nonverbal communications, and evaluate the constitutionality of the litigator's own intuitive preferences. This strategic approach to voir dire, which ex-

reliance on direct query techniques. *Id.*; *see also* RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 77-78 (1990) (noting that poor record of selecting jurors on demographic and personality variables has convinced many lawyers to employ social science methodologies to identify juror bias and pre-elect juror receptivity). *See* BERGER ET AL., *supra* note 4, at 174. "Juror-personal," general trial, and case-specific questions, carefully structured and posed, should provide information that enables a litigator to determine whether to strike a juror, and sufficient grounds for the strike. *Id.* A strategic line of inquiry targeted toward uncovering juror attitudes, therefore, should enable the attorney to exclude jurors for reasons beyond race or gender, and would facilitate the attorney's explanation of the peremptory challenge, if necessary. *Id.*

[114] *See generally* SANNITO & MCGOVERN, *supra* note 4, § 3.10. "One of the most critical items of information to know about prospective jurors are their occupations." *Id.*; RIEKE & STUTMAN, *supra* note 113, at 73. Although demographic variables of age, education, status, and occupation have not been substantially studied to determine their influence on verdicts, juror age has been subject to the most analysis. *Id.* The consistent finding has been that younger jurors usually acquit more often than older ones. *Id.* Other studies have found that the socioeconomic disparity between defendants and jurors influences verdicts; usually the greater the disparity, the greater the likelihood of a conviction. *Id.*

[115] *See, e.g.*, JEANS, *supra* note 94, § 9.6 (recognizing that voir dire is not selection process but, actually, system of elimination); STARR & MCCORMICK, *supra* note 35, § 7.1 (noting relationship between demographic variables and juror attitudes). All other variables being equal, a litigant may use peremptory challenges to choose certain jurors over others, to safeguard against actual or implied juror bias that may not emerge during voir dire.

[116] Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). "Jur[or] competence is an individual rather than a group or class matter." *Id.*; *see also* Taylor v. Louisiana, 419 U.S. 522, 528 (1975). "The selection of a petit jury from a representative cross section . . . is an essential component of the Sixth Amendment right to a jury trial." *Id.*; *cf. id.* at 528. Although drawn from a cross-section of the community, however, every jury may not necessarily contain representatives of each economic, social, religious, or political group of the community. *Id.*

tends beyond invidious classifications based on stereotypical generalizations, provides litigators with more reliable grounds for selecting jurors as well as a more effective basis for defending peremptory challenges, should a *Batson* claim arise. Peremptory challenges, therefore can be a valuable and constitutional tool for the litigator. Peremptories should be preserved as an instrumental means for ensuring the constitutional right to an impartial jury.

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